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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

15 CR 537 (VEC)

5 RASHAAD CONYERS,

6 Defendant.

BAIL REVIEW

7 -----x
8 New York, N.Y.
9 May 20, 2016
2:00 p.m.

10 Before:

11 HON. VALERIE E. CAPRONI,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 DINA McLEOD

Assistant United States Attorney

18 BRADLEY L. HENRY

19 Attorney for Defendant
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1 (Case called)

2 THE COURT: Mr. Henry, this is your motion.

3 You're requesting a reconsideration?

4 MR. HENRY: Yes, I think that's probably the right
5 characterization.

6 As the Court is aware and just as a little background,
7 we sought release for Mr. Conyers in this case previously --

8 THE COURT: I remember.

9 MR. HENRY: -- prior to the superseding indictment.

10 Now we are in a position where there has been a
11 superseding indictment filed. The charges are a bit different.

12 The impetus for my request to reopen the hearing are
13 essentially two pieces of evidence that have come out since the
14 last hearing in front of this Court, the first of which is
15 there has been DNA testing on the .45 caliber gun, which was
16 the gun that was in question during those hearings which
17 Mr. Conyers originally was alleged to have simply possessed and
18 is now alleged to have used to do a shooting in aid of
19 racketeering.

20 The second piece of evidence is a video of, I assume,
21 a cooperating witness at this point that was taken in the
22 precinct by the state detectives wherein he is interviewed
23 about the incident where two guns were recovered. The
24 interview happened on May 20th, they say. They don't give a
25 date when the guns were recovered, but they say a few days ago,

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1 where he admits, one, to having the .45 caliber -- to be the
2 one shooting the .45 caliber and dropping the .45 caliber and
3 running. They question him about these video surveillance
4 issues. So those two pieces of evidence, Mr. Conyers -- no DNA
5 on the weapon -- and some other individual admitting that he
6 had and was firing that weapon.

7 THE COURT: How many guns were recovered?

8 MR. HENRY: There were two guns that were recovered.
9 There was a .45 caliber Hi-Point automatic or semiautomatic
10 pistol. The other weapon was a .22 six-shot revolver, I think,
11 that had a little tan handle on it; it was a big black weapon.

12 As the Court may recall, in the complaint of this case
13 there were a number of things that were said not only in the
14 complaint of the case, but during the hearings from this case.

15 In the previous hearings, the government had alleged
16 in the August 20th hearing in front of the magistrate a few
17 things. One is that two police officers saw the weapon that
18 Mr. Conyers allegedly tossed, saw him toss the gun. The
19 defendant -- that was the gun that fired the bullets because
20 they recovered shell casings and an unfired bullet, all of
21 which are .45 caliber bullets. They didn't recover any .22
22 shell casings and haven't alleged, to my knowledge, the .22
23 caliber was fired at all ever.

24 The government also stated that the witness -- I'm
25 assuming this is the individual that has previously said that

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1 he was the one shooting the .45 -- ID'd Mr. Conyers and said
2 that he was the one doing the shooting. The complaint says
3 throughout it, it identifies Firearm No. 1 as the .45 caliber
4 weapon; and it goes on to say that it was tossed by
5 Mr. Conyers, that it is, in fact, a .45; and that those .45
6 caliber casings were found. They have subsequently been
7 tested, ballistics have been done and so on and so forth. But
8 there is nothing on the casings, no fingerprints, no DNA or
9 anything taken from that to connect it to Mr. Conyers.

10 So as a result of that, the government, in their
11 letter that was filed just this morning, says that really
12 doesn't make a difference in this case. I quite disagree. I
13 think it makes a pretty big difference in this case. The
14 reason being is even though the charges have changed in terms
15 of context and seriousness, for that matter, for each of the
16 counts the Mr. Conyers faces, the government has to prove that
17 he was in possession or conspired to be in possession of or
18 shoot or do something with that .45 caliber weapon.

19 For the RICO case, they have alleged that one of the
20 two predicates they have to prove is, in fact, the shooting
21 with the .45; so if they can't prove that, then they have no
22 RICO case.

23 The felon-in-possession, obviously if Mr. -- and they
24 admitted as much in their letter, if they can't prove
25 Mr. Conyers possessed it, they can't prove that charge.

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1 The 924(c) is the use in furtherance of. Again, in
2 relation to this weapon and the attempted murder in aid of
3 racketeering was alleged to be this shooting, not his prior
4 attempt which he has already served his state sentence for.

5 As a result of that, I think that does a couple of
6 things. We talked to the magistrate judge about how can we
7 reasonably assure that Mr. Conyers is not a danger to the
8 community sufficient to overcome the bail argument and the
9 presumption that now exists.

10 THE COURT: That now exists that did not exist at the
11 time.

12 MR. HENRY: That's correct; it does now exist.

13 But case law is really pretty clear around the country
14 that the presumption is rebuttable, just it needs some
15 evidence. There are some cases that say putting a defendant on
16 an ankle monitor overcomes the presumption. The fact that he
17 was working with the Harlem Justice Corps and had graduated and
18 was doing a number of things with them would overcome that
19 presumption. At that point then the question is how do we
20 reasonably assure the safety of the community. It's not
21 guaranteed, the safety of the community, because there's no way
22 to do that, and comply with the Bail Reform Act, because the
23 Bail Reform Act was enacted, as we all know, to make sure that
24 individuals could get bail; it is skewed that way on purpose.

25 Gang membership alone is not sufficient to overcome

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1 the presumption; that's from a Fifth Circuit case, *U.S. v.*
2 *Jackson*, which is 845 F.2d 1262. Past danger alone, the
3 attempted murder, which he has already served his sentence for,
4 alone is not sufficient.

5 THE COURT: How about the fact that he was seen firing
6 a weapon while he was on parole for that offense, from the
7 standpoint of dangerousness?

8 MR. HENRY: That's true.

9 Well, the argument would be that he wasn't seen firing
10 a weapon; he didn't fire the weapon; his DNA is not on it.

11 THE COURT: Just because his DNA wasn't on it doesn't
12 mean he didn't touch the gun or fire the gun.

13 MR. HENRY: Certainly.

14 THE COURT: We've all been around that bush before.
15 You don't always get fingerprints; you don't always get DNA.

16 MR. HENRY: That's true.

17 THE COURT: The government has a little party when
18 they find the DNA, but it's not the end of the world if they
19 don't have DNA.

20 MR. HENRY: That's true. I agree with that. An
21 expert would certainly say that.

22 The more compelling evidence is you have another
23 individual admitting that it was him shooting the gun, not
24 Mr. Conyers. It's pretty convenient that that cooperating
25 witness is now saying, Oh, yeah, Mr. Conyers shooting the gun,

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1 that's fine; of course he would say that.

2 So I think the level of evidence that the government
3 alleged existed in this case in the prior hearings, which was,
4 We've got a guy saying Mr. Conyers was shooting the gun, I have
5 the police saw him doing it.

6 The police didn't just see him shoot a gun; no one saw
7 him shoot the gun, if he did shoot the gun.

8 THE COURT: It's on video.

9 MR. HENRY: It's on a video. The Court, I believe,
10 watched it --

11 THE COURT: I did.

12 MR. HENRY: -- the last time. And you can see some
13 things. It's my opinion -- and the Court certainly can
14 disagree -- that you can't see a gun, you can't see what the
15 gun looks like, you can't even see the faces of the individuals
16 who are in the video.

17 THE COURT: That's true.

18 What you can see is a motion that is consistent with
19 aiming and firing a gun. Don't you see a flash?

20 MR. HENRY: I do not see a flash.

21 THE COURT: I don't remember. I can't remember
22 whether you can see a flash or do you hear a pop.

23 MR. HENRY: I don't think there's any sound on the
24 video.

25 THE COURT: It's a raise like that, and then something

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1 happens, and then they take off running.

2 MR. HENRY: Yes. It's two individuals, and they sort
3 of do one of these kind of things, a ducking sort of motion,
4 and then they take off running back the other direction. To
5 the extent that that can be consistent with firing a gun, it
6 can also be consistent with dodging someone shooting a gun --

7 THE COURT: Now, it's clear that one of those two men
8 had a gun and was aiming it, my recollection is, and shooting
9 it in the courtyard area or right outside of a public housing
10 project.

11 So I guess, Mr. Henry, what I would ask you to address
12 is even if your client didn't fire the gun, if he's one of the
13 two guys, how have you overcome the presumption? Because what
14 I'm concerned about is the safety of the community.

15 MR. HENRY: Of course. Of course.

16 Here are a few things that shed light on that and
17 provide us some context to ensure or reasonably ensure safety
18 of the community, particularly in that area, because all of
19 these crimes and the RICO conspiracy all have alleged to have
20 occurred in this housing community up on 145th and Third Avenue
21 approximately.

22 THE COURT: I got the idea that there are warring
23 gangs that have turf.

24 MR. HENRY: So there is one issue which was addressed
25 in magistrate court, maybe not as much so here, is that

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1 Mr. Conyers doesn't live in that community; he lives with his
2 mother. And as I put on the record in magistrate court, it's
3 at least a 15-minute car ride, at least a 15-minute subway
4 ride, and it takes about an hour and-a-half, hour and 20
5 minutes, to walk from one place to the other.

6 So for Mr. Conyers, if he is placed in his mother's
7 home and placed on a GPS ankle monitor and placed on strict
8 supervision and house arrest and he is not leaving his home,
9 then we can assure that he's not going to be in that community;
10 he's not going to be over at 145th and Third, because as soon
11 as he walks out of his house and it's an hour and 20 minutes
12 walking away, then somebody is going to know about it. I think
13 that, one, it overcomes the presumption; and two, it provides
14 us with some insurance that he's not going to be over there
15 doing what it was that he's alleged to have been doing.

16 Two is even assuming he was one of the two guys,
17 right, and taking at face value that he was present during that
18 time --

19 THE COURT: Well, there is an indictment which carries
20 some weight.

21 MR. HENRY: That's right, because it's been to the
22 grand jury.

23 THE COURT: Correct.

24 MR. HENRY: Somebody sat there and listened to it and
25 said, All right. There's enough there to issue an indictment.

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1 But, again, that's probable cause finding, which is
2 much less, much less than the standard at trial, which is
3 beyond a reasonable doubt. Mr. Conyers is still, as he sits
4 here, presumed to be innocent --

5 THE COURT: Absolutely.

6 MR. HENRY: -- in this case. And so that's sort of
7 the lodestone starting point for all of these things.

8 We know the size of this case. The Court is well
9 aware at this point of the size and magnitude of the number and
10 volume of information in this case and the types of charges
11 that are involved. This is a case that's going to go for a
12 while, right. Mr. Conyers holding that presumption of
13 innocence, but then being detained for trial for -- it has
14 already been a year. It was a year I think about a week ago,
15 May 13th or 14th, when he first came in. So he's already been
16 in for 12 months on this case and presumably for many, many
17 more months, if not a year or so before we ever get to a trial
18 to decide these issues.

19 The quantifiable nature of the evidence in this case
20 is essentially this: You've got casings, you've got a firearm
21 recovered, you've got eyewitness testimony from an officer.
22 Eyewitness testimony has obviously inherent problems, not
23 because the officer is going to get up there and lie or
24 anything like that, but eyewitness testimony is faulty because
25 we're humans.

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1 We have cooperator testimony, who at some point has
2 said that Mr. Conyers was shooting a gun, but has also
3 contradicted himself originally and said that he was the one
4 shooting the gun. That's really pretty unreliable testimony,
5 even if that wasn't true because of the nature of it. There is
6 no DNA. It boils down to two individuals saying Mr. Conyers
7 did what they say he did. So in the stratosphere of cases,
8 it's not necessarily the strongest case.

9 I will point out that the level of evidence in a case
10 is probably the least important point. Courts have pointed out
11 that that's probably the lowest of the other standards.

12 I think for Mr. Conyers, when he got out of prison,
13 another thing that sort of ensures for us that he was on the
14 right path or could have been on the right path --

15 THE COURT: Well, he could have been, but what he was,
16 at a minimum, he was in gang territory and present at a
17 shooting.

18 MR. HENRY: Well, we know he was at 145th and Third
19 because that's where he was arrested.

20 THE COURT: As I remember, the police officers hear
21 the shot and then see him running; and they pair that with the
22 video that he was the guy who was there.

23 MR. HENRY: I will say this: We'd be here a long time
24 watching all the videos. But my watching of the video, which
25 I've done numerous times to this point, and written out

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1 timelines and tried to map it all out, what I found is this:
2 What is a substantial amount of time? There is an amount of
3 time between the time the gunshots are alleged to have been
4 fired and the time a police officer sees two individuals
5 running and they start chase. It's 30 seconds or 45 seconds.
6 It's not gunshots and they see somebody and they start running,
7 right. It's around the corner and all the way over in a
8 different part of the housing area. So it's not an immediate,
9 "I hear gunshots, I look, and there's two guys, and I start
10 running after them." It is not that.

11 Then there is still this question of in the complaint
12 it says officers gave chase and then eventually Mr. Conyers was
13 arrested on 145th and Third. In that sworn statement it says
14 nothing about they maintained eye contact the whole way. Now,
15 the government alleges that the officers would say, I
16 maintained eye contact the whole way, which is the basis of my
17 request to have the officer come in at the previous hearing.
18 But there are factual issues in the proof and timeline of this
19 case that cause us some concern. But we know he was at 145th
20 and Third because he was arrested there, I have no question
21 about it.

22 But proving the case and doing those things, him being
23 present at a location, he could have been running away from the
24 shots just like everybody else may have been, right. He hears
25 gunshots and he takes off running; he runs to the cops and they

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1 say, Oh, there's this guy that looks like the guy that got
2 called into the radio, and they arrest him, right. Maybe
3 that's true, maybe it's not, I don't know.

4 But to overcome the bail issue --

5 THE COURT: The presumption.

6 MR. HENRY: The presumption.

7 THE COURT: I had interrupted you. You said he gets
8 out of jail, he could be on the right track, and I interrupted
9 you by saying, Well, he was at the scene of a shooting --

10 MR. HENRY: Of course.

11 THE COURT: -- which would not really qualify as the
12 right track.

13 MR. HENRY: So going back, putting that sort of to the
14 side, he was going to the Harlem Justice Corps. He had, while
15 he was there, completed a 12-week, 350-hour community service
16 project restoring a local church. He had completed a Ready,
17 Set, Work employment readiness program and he was reporting to
18 the Justice Corps on a weekly basis at least in order to get
19 job training and try to find a job so that he could get to work
20 again.

21 He completed the Retention Works, which is an
22 internship and job retention curriculum developed by the New
23 York Department of Labor; he completed nine weeks and over 250
24 hours of a site mentorship internship at the Harlem Justice
25 Corps where he mentored new members, individuals who were

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1 coming in to be part of the justice corps program. He
2 graduated from the program in March 2005. And we have lots of
3 nice --

4 THE COURT: 2005?

5 MR. HENRY: 2015, I'm sorry.

6 Lots of nice photos of him and his family at the
7 graduation, so forth. Shows community support, ties to the
8 community and all of those things which the Bail Reform Act
9 talks about.

10 THE COURT: I don't have any doubt he's got good ties
11 to the community. I'm not concerned about flight.

12 MR. HENRY: He received an award for outstanding
13 personal growth in his cohort's graduation ceremony. The
14 letter goes on to say -- this is from Allison Trenk, who's the
15 program manager, and I can hand this up if the Court wants to
16 read it, but it says: While Rashaad's accomplishments are
17 impressive, they don't fully capture the transformation that
18 took place while he was at the Harlem Justice Corps. He worked
19 on his behavior by utilizing cognitive behavior therapy, which
20 they call CBT. In CBT, a person must look at a situation
21 objectively and they need to identify thoughts and attitudes
22 and feelings related to that situation and connect to those
23 thoughts and attitudes in order to change their behavior and
24 understand the problematic behavior that they've had in the
25 past.

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1 In any event, the people who were working with him in
2 that program had a lot of really great things to say about him
3 and what he was doing during his time, trying to use it
4 productively while he was out on parole.

5 I will mention to the Court, I think this is worth
6 mentioning, that he is on parole and I think continues to be.
7 There has been no violation filed as a result of that. The
8 Bail Reform Act, 3142, has a procedure for which the government
9 goes through what they believe that that's going to be an
10 issue, it's like a ten-day -- same thing with an illegal
11 immigrant or illegal alien where they look to see if there is
12 going to be some issue with that. And that issue alone can't
13 be enough to hold Mr. Conyers in. He is entitled to a hearing
14 and entitled to bail review regardless of the state parole
15 issue certainty at this point under 3142 structure.

16 I would suggest to the Court that with a sufficient
17 amount of bail, unsecured bail, signed by any number of
18 individuals, there are numerous individuals who would sign it.

19 THE COURT: But nobody has any money.

20 MR. HENRY: I think there are individuals who
21 certainly have jobs; they are financially-responsible
22 individuals.

23 THE COURT: Okay.

24 MR. HENRY: I think the signing of that very strict
25 supervision obviously, ankle monitor, home arrest, him being at

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1 home and not permitted to leave unless prior permission is
2 given for very limited circumstances, drug testing obviously,
3 and all of the other standard conditions of release, I think if
4 those things are put in place for Mr. Conyers and he can meet
5 all of those conditions to obtain bail in this circumstance --
6 flight is not so much of an issue, he's not going anywhere --
7 that we can ensure that the place where these things are
8 alleged to have happened, 145th and Third, we can keep him away
9 from there very easily. We can put restrictions on him that
10 make sure he is well away from that area and it keeps him in
11 the house, keeps him away from doing things that may get him
12 again in front of this Court looking at being revoked on bail
13 and other issues.

14 So I think overcoming the presumption, which is that
15 those things would take care of overcoming that presumption to
16 a certain extent, and the showing has to be small, with his
17 ties to the community and his family support and things that he
18 was doing positive in his life before he came in on this case,
19 the ankle monitor, the bond issue, monetary issues, all of
20 those things would be sufficient to reasonably assure that the
21 community is safe while Mr. Conyers is on bail.

22 So for those reasons, I'd ask the Court to set those
23 conditions. Unless you have any other questions, I'll let the
24 government speak.

25 THE COURT: Okay.

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Ms. McLeod.

MS. McLEOD: Yes, your Honor.

The defendant has not met his burden of --

THE COURT: Let me just interrupt you for a second.

Is the defendant aware that I got some *ex parte* information about the case?

MS. McLEOD: No.

THE COURT: They are now.

MS. McLEOD: Yes.

THE COURT: Okay.

So I got the same letter that you got, but with some additional information filling out some information regarding the government's case.

MR. HENRY: I understand.

MS. McLEOD: Much of what I have to say, I think, is flushed out in detail in the submission.

As the Court noted, as defense counsel noted, there is a presumption in this case. The government submits that even without that presumption, this is not a close case for bail.

There are four factors in the bail reform statute, one of which is the weight of the government's case. As the government laid out in its submission, the two pieces of evidence that the defendant characterizes as significantly exculpatory, in fact, do not do much to undermine the strength of the government's case and, in fact, defense counsel, I

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1 think, significantly underplays how strong the government's
2 case is as to the May 12, 2015 shooting.

3 I'll just make a couple of factual points.

4 The first is that the May 12th, 2015 shooting
5 underlies some of the charges that the defendant is facing, but
6 not all of them. For example, the racketeering conspiracy, I
7 think defense counsel said that the racketeering conspiracy
8 ties to this shooting. While it's fair to assume that the
9 government would use that shooting as proof of the racketeering
10 conspiracy, in fact, the overt act in Count One of the
11 racketeering conspiracy that's tied to Mr. Conyers is the 2007
12 attempted murder to which the defendant pled guilty.

13 In addition, the firearms count --

14 THE COURT: I'm sorry. For racketeering conspiracy,
15 do you have to prove two predicates?

16 MS. McLEOD: Yes. But no single person has to --

17 THE COURT: Has to commit two predicates. Okay.

18 MS. McLEOD: So that's just one, sort of, factual
19 clarification. And the same thing with the 924(c) count is
20 tied to the racketeering conspiracy, not to the
21 attempted-murder-in-aid-of-racketeering count.

22 So the May 12, 2015 -- the arguments related to that
23 are relevant to certain of the counts, but, again, it doesn't
24 address all of the charges that the defendant is facing and,
25 therefore, doesn't fully address the weight of the government's

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1 case as to those charges.

2 But the government would submit that the evidence in
3 the May 12, 2015 case is extremely strong. I think the Court
4 has identified the issue with the DNA exclusion; it's not
5 particularly meaningful, especially at this stage. Certainly
6 it's fodder at trial if the defendant wants to bring that up
7 and argue it, but it's not something that is so significantly
8 exculpatory here that it warrants pretrial release.

9 The second point relating to the witness post-arrest
10 statement, so another important factual clarification here is
11 that, in fact, the government has always proffered as its
12 evidence and as, sort of, the events of May 12, 2015, that, in
13 fact, two defendants went into rival gang territory or two
14 people went into rival gang territory, one of which being the
15 defendant, each of which had a gun, both of whom fired the gun.

16 Defense counsel's argument that while the post-arrest
17 statement is really saying, I fired the gun, not him, the
18 theory has always been two defendants fired the gun, there were
19 two weapons recovered; and, in fact, that's something that the
20 government referred to on -- this is page 9 of the October 5th
21 bail hearing in front of your Honor, which is Exhibit B.

22 THE COURT: Hang on just a second.

23 Page what?

24 MS. McLEOD: Page 9.

25 THE COURT: Okay.

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1 MS. McLEOD: And in about the middle of the page, the
2 government notes to the Court -- and this is as we're
3 describing what we believe the video shows, the government
4 believes that it is fairly clear that is what is happening.
5 Both of the defendants are raising their arms in a firing
6 motion and firing. The Court then viewed the video. I think
7 it's clear from the video that there's someone in a black
8 sweatshirt who raises his arm and fires. And then immediately
9 after that, the defendant in a white T-shirt also fires.

10 So there's no, sort of, Well, the post-arrest
11 statement shows that, in fact, it was someone else; there was
12 another man who was doing it. This is not inconsistent at all
13 with what the government has always said the case is, which is
14 that both people had a gun, and both people are -- both persons
15 fired the gun.

16 As set forth in the submission, because the attempted
17 murder charge includes aiding and abetting, both
18 co-conspirators are responsible for the other person's gun and
19 the other person shooting. So it's really not relevant in this
20 case which gun the defendant possessed; although, again, that's
21 fodder for cross if the defendant wants to explore at trial
22 that there's some inconsistency about the gun, that's certainly
23 fair game. But it's not something that so significantly
24 undermines the government's case as to the May 12th events.

25 There's quite a lot of evidence here. There's more

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1 evidence here, in fact, than many shootings charged by this
2 office. The fact that the actual shooting is caught on video,
3 there is a cooperating witness, there is law enforcement
4 testimony who see both of the men and see them toss guns right
5 after the shooting, and then there is ballistic results from at
6 least one of the guns possessed by the men. It's fairly strong
7 evidence that leads, sort of, from the very beginning, the
8 story that will be told in terms of walking into rival gang
9 territory, and then all the way towards the end where the law
10 enforcement sees the aftermath of the shooting and then see the
11 defendants fleeing, much of which is caught on video.

12 That's primarily what defense counsel's argument today
13 is focused on. The government submits that that's simply not
14 enough to rebut the presumption when you consider exactly what
15 the government has always proffered to be the case, which is
16 that both co-conspirators had guns and both of them fired the
17 guns, and that's something that you can see on the video.

18 THE COURT: So the statement that the other shooter
19 made on tape was, I fired my gun. Does he say on tape,
20 Mr. Conyers did not fire a gun or Mr. Conyers was not there?

21 MS. McLEOD: No. Simply says, I was shooting the .45
22 is essentially the extent.

23 THE COURT: Okay.

24 MS. McLEOD: The other thing I would note -- and this
25 is not something that defense counsel dealt with at all -- is

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1 that the other three factors clearly weigh in favor of
2 detention here, strongly in favor of detention here. The
3 defendant was on parole for a gang-related attempted murder; at
4 the time he committed another gang-related attempted murder.

5 In addition --

6 THE COURT: I'm sorry.

7 He was in the other gang's territory?

8 MS. McLEOD: Yes. He was in the territory -- he was
9 in -- yes.

10 THE COURT: He was arrested in the other gang's
11 territory.

12 MS. McLEOD: I believe he was on the border at that
13 point.

14 THE COURT: Okay.

15 MS. McLEOD: The other thing that's particularly of
16 note for the Court's evaluation of pretrial release and
17 amenability to supervision is the defendant's behavior in
18 prison. Since he's been in custody, he has not been on good
19 behavior; he has recently twice been subject to disciplinary
20 sanctions for violent behavior, once for assaulting another
21 inmate. Just before this conference, legal counsel at the MDC
22 sent me the hearing report for that and gave me the details.
23 According to the discipline hearing report for the March 19th
24 assault -- and this was, A, on video and, B, admitted to by the
25 defendant at the hearing -- the defendant struck another inmate

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1 with a closed fist to the face, and he continued to kick and
2 punch the other inmate in the body and dragged him. This was
3 in the common area of his housing unit.

4 MR. HENRY: Your Honor, I haven't seen a copy of that.
5 May I?

6 MS. McLEOD: Because I just received that just now, I
7 do not have a copy of that hearing report. I do have -- and
8 this is just the BOP sentry report.

9 THE COURT: Okay.

10 MS. McLEOD: I can decipher that for the Court; the
11 BOP sort of talked me through it as well.

12 It sort of lists the two -- essentially the two
13 disciplinary charges he faced when the incidents happened.
14 "DS" stands for disciplinary segregation. So you can sort of
15 see the penalties that happen and you can see the dates of the
16 hearing.

17 The basics of the sentry -- or the facts in the sentry
18 report are set forth in the government submission on page 6.

19 What's particularly of note is that on March 29, 2016,
20 the defendant struck another inmate with a closed fist, kicked
21 and punched him in the body, dragged him in the common area.
22 He was placed in disciplinary segregation and then released
23 from disciplinary segregation about a month later.

24 Two weeks after being released from disciplinary
25 segregation, he gets in another fight with another inmate. And

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1 he again is sanctioned by being put in disciplinary
2 segregation, which he presumably is in right now. As the
3 government notes in its submission, defendant filed this motion
4 for bail in early May. After he filed that motion for bail, he
5 got in this fight with an inmate.

6 So there should be serious concerns here about the
7 defendant's ability to refrain from violence, the defendant's
8 ability to control himself, the defendant's ability to refrain
9 from impulsive behavior. There's simply nothing in the record
10 here that demonstrates that there are some set of conditions
11 that could guarantee the safety of the community when even in
12 prison the defendant is not able to comport himself
13 appropriately.

14 Unless the Court has any further questions.

15 THE COURT: I just have one.

16 Am I correctly remembering that it was Mr. Conyers
17 that had to be brought into the courtroom to get a DNA sample
18 from him?

19 MS. McLEOD: Yes, that's correct.

20 THE COURT: Okay.

21 Mr. Henry, do you have anything else you want to tell
22 me?

23 MR. HENRY: Just real briefly.

24 I won't spend a lot of time on the government's
25 statement that their position has always been that there were

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1 two guns that were fired. There is no evidence in discovery,
2 zero, that the .22 was fired at all, period, ever. There are
3 no casings. It doesn't say whether the firearm was loaded or
4 not loaded at all.

5 THE COURT: There's no question that Ms. McLeod -- I
6 think it was -- was it you or Mr. Enzer?

7 MS. McLEOD: It was me, your Honor.

8 THE COURT: Said --

9 MR. HENRY: So two people raised their arm.

10 THE COURT: No. During the argument before me on bail
11 that there were two guns fired.

12 MR. HENRY: Right.

13 THE COURT: That was the proffer to me, is that there
14 were two guns fired.

15 MR. HENRY: But there is no actual physical evidence
16 that that second gun was ever fired, ever.

17 THE COURT: Okay. So they didn't find the shell
18 casing?

19 MR. HENRY: The gun was either not loaded at all or
20 fully loaded. In either event, it wasn't fired; so there is no
21 evidence that it was fired.

22 THE COURT: That's two radically different things.
23 The fact that there was not a bullet in the gun when they found
24 it does not mean it wasn't fired. Even if it was fully loaded,
25 it doesn't mean it wasn't fired.

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1 MR. HENRY: When you think about a semiautomatic
2 pistol and you fire the gun, bullets released --

3 THE COURT: Unless it misfires.

4 MR. HENRY: -- the casing is dechambered, right. In a
5 revolver, casings stay in the gun. If there are no casings in
6 the gun, there are no -- in any event, in the hearing before
7 that, the testimony was -- or the statements were that two
8 police officers saw the defendant with a weapon, saw him toss
9 the weapon, and the ballistics report run by the NYPD
10 ballistics laboratory confirms the defendant's gun,
11 Mr. Conyers', in fact, did fire a number of rounds on the
12 block. The only ballistics testing that has been done is on
13 the .45. That's it.

14 THE COURT: Okay.

15 MR. HENRY: In any event, that's neither here nor
16 there really; that's trial issues.

17 I think as far as the disciplinary issues, the new
18 incident, I haven't really had an opportunity to speak to
19 Mr. Conyers about, so I don't know a lot about that.

20 I will say that the incident before that -- and I can
21 put on the record that having spoken to Mr. Conyers, he had a
22 hand injury; it was really pretty swollen. There is a dispute
23 about -- and I don't have the hearing minutes or an email from
24 what they discovered, but it is my understanding that that was
25 not a fight, it was a basketball injury for which they had a

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1 hearing and said, Why is your -- what's the problem? And
2 because no one would admit on the record what happened, they
3 sanctioned essentially everybody and gave them 30 days in the
4 hole. That's my understanding of that issue.

5 The second one I can't really shed any light on.

6 THE COURT: His refusal to give a DNA sample until I
7 ordered him into court?

8 MR. HENRY: So his refusal to give a DNA sample --
9 Mr. Conyers wanted the DNA testing done. He was eager to have
10 DNA testing done. The issue with him coming into court, I
11 think they had scheduled -- there are emails back and forth
12 between us on this issue, but I think we had scheduled and
13 talked about doing that testing on a Friday. And I, without
14 having spoken with Mr. Conyers, said that would be fine.

15 Anyway, some issue came up. His family was supposed
16 to come visit him that day or something like. And so he
17 refused because he didn't want to miss what he had going on at
18 the jail that day. Then when the Court ordered him in, he had
19 already told me at that point in an email, said, I'm ready to
20 go. That's fine now.

21 So it wasn't an issue of him being obstinate --

22 THE COURT: My recollection is that it was more than
23 one. Am I misremembering that?

24 MR. HENRY: Honestly, your Honor --

25 MS. McLEOD: That's correct, your Honor.

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1 MR. HENRY: -- I don't recall.

2 MS. McLEOD: He refused to be produced twice.

3 MR. HENRY: Okay.

4 THE COURT: Okay.

5 Mr. Henry --

6 MR. HENRY: In either instance, it was not, "I don't
7 want to go because I don't want them to swab me." I think it
8 was more about --

9 THE COURT: That's not the issue. Whether he wanted
10 DNA taken or not, that's not the issue. As I've said to all of
11 the defendants now several times, this notion of defendants
12 saying, "I'm not coming," when they've been directed to come to
13 court or to the U.S. Attorney's Office for samples is
14 unacceptable. I don't know where that started, that it's okay
15 for an inmate to decide that his schedule is more important
16 than what's been directed by the Court. So be that as it may.

17 MR. HENRY: I understand, your Honor.

18 THE COURT: Long story short, I don't think you've
19 overcome the presumption. I am exceedingly concerned that this
20 defendant poses a very real risk to the community. I am not
21 convinced that those risks could be mitigated by house arrest.
22 I think all of the points that you raise about the government's
23 evidence, I look forward to hearing them be developed and
24 presented to a jury.

25 I certainly appreciate the fact that Mr. Conyers has

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1 the presumption of innocence. I will guarantee that he is
2 entitled to that and that the jury understands it. My desire
3 is to get at least one of these cases to trial pretty soon or
4 as soon as I can. The delay is largely because of the
5 defendants need time with the discovery and that's important so
6 that the defendants can have a fair trial.

7 So your request for the bail determination to be
8 reconsidered is denied.

9 Anything further from the government?

10 MS. McLEOD: No, your Honor.

11 THE COURT: Anything further from the defense?

12 MR. HENRY: No, your Honor.

13 THE COURT: All right. Thank you, all.

14 * * *